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No. 96-434

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

UNITED ARAB EMIRATES; MINISTRY OF DEFENSE, UNITED ARAB EMIRATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF OF PETITIONER

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10 pp

TABLE OF AUTHORITIES

CASES	Page
Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982)	2
Merrell v. Timmons, 158 S.W.2d 278 (Tex. 1942)	7
Republic of Argentina v. Weltover, 504 U.S. 607 (1992)	4, 8
Saudi Arabia v. Nelson, 507 U.S. 349 (1993)	4, 8
Transamerican Steamship Corp. v. Somali Democratic Republic, 767 F.2d 574 (7th Cir. 1989)	6
STATUTE	
28 U.S.C. § 1605(a)(2)	1
MISCELLANEOUS	
3 Richard A. Lord, *Williston on Contracts* § 7.19 (4th ed. 1992)	8

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REPLY BRIEF OF PETITIONER

Respondents offer no persuasive reason why the Court should not grant review of the Fifth Circuit's ruling construing the Foreign Sovereign Immunities Act (FSIA) and its "commercial activity" exception, 28 U.S.C. § 1605(a)(2). As MCI showed in its petition (pp. 8-21), the panel majority's ruling departs from the decisions of this Court and other circuits by announcing several broad new points of law, including the propositions that: (i) promises made through "diplomatic channels" are not enforceable in United States courts; (ii) a foreign government's promise to assume its citizens' debts to United States nationals is not a commercial activity; (iii) a promise to undertake an obligation owed by another party is not "commercial" absent a preexisting contractual relationship; (iv) forma-

tion and breach of a contract is not a "commercial" activity unless the parties have an overall commercial "nexus," and (v) transactions without a profit motive are not "commercial activities" under the FSIA. *See* Pet. 8-21.

Respondents made no serious attempt to defend these propositions or other aspects of the panel majority's actual decision. Instead, they seek to avoid the legal questions presented below by recasting the *factual* record upon which the court of appeals (like the district court) based its ruling. Throughout their brief, respondents seek (for the first time) to recharacterize what both courts below, properly relying on MCI's well-pleaded allegations, treated as the breach of a promise by respondents to MCI as the "denial" of a "petition for redress"—suggesting (wrongly) that the UAE ambassador was essentially acting as a "neutral" referee of a dispute between MCI and the UAE citizen-trainees.

Respondents' effort to re-invent the pertinent facts in this Court is obviously inappropriate given the procedural posture of this case. Because respondents chose not to appear in the district court to defend the action, a default judgment was entered against them (*see* Pet. App. 27a, 29a). As the court of appeals recognized, respondents thereby forfeited their right to defend on the merits. Pet. App. 6a (citing *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982)). For this reason, and because no hearing was ever held on issues relevant to jurisdiction, the "commercial activity" question was properly resolved by assuming the truth of plaintiff MCI's factual allegations, including the critical allegation that respondents made unambiguous promises to repay MCI for the unauthorized long-distance calls. Accordingly, both courts below decided the case on the basis of MCI's allegations. Pet. App. 6a-8a, 16a-17a.[1]

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[1] Although the district court plainly relied upon MCI's allegations in rejecting respondents' claim of immunity, *see* Pet. App. 16a-17a,

Respondents' reliance on self-serving, newly created factual allegations is nothing more than an attempt to avoid the important legal issues raised by the court of appeals' decision.

Rather than addressing the legal bases of the court of appeals' decision, respondents contend that when the UAE officials made the disputed representations to MCI, they were acting as neutral governmental arbiters of a dispute between third parties (*i.e.*, MCI and the UAE trainees). Respondents assert that "the UAE Embassy engaged in ordinary or core diplomatic activity by essentially attempting to resolve or settle a dispute that had arisen between third parties of different nationalities," Br. in Opp. 8-9, and refer to the critical events in suit as "making conditional promises to pay in connection with the official consideration, investigation, and denial of MCI's petition for redress." Br. in Opp. 5.[2] *See id.* at 7 (describing relevant activity as "passing upon and eventually denying MCI's petition for redress"); 10 ("passing on a host country national's petition for redress of grievances allegedly suffered at the hands of the foreign sovereign's nationals"); 20 ("passing upon the host national's petition for redress"). *See also* Br. in Opp. 17 (asserting that the ambassadorial promises on which MCI's lawsuit was based "played, at most, only a small, incidental role in this essentially governmental and diplomatic activity of

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respondents never requested the court of appeals to remand the case for a hearing to resolve any factual disputes affecting jurisdiction under the FSIA.

[2] The phrase "petition for redress," although used repeatedly in respondents' Brief in Opposition, was not used earlier in this proceeding, whether by parties, lawyers, or judges. There is no sign that any party understood the dealings between UAE officials and MCI as involving any such "petition."

acting upon a host country national's petition for redress").[3]

Neither court below embraced respondents' present version of the facts, and for good reason. Respondents' rendition depends upon a peremptory rejection of MCI's factual allegations. According to MCI's submissions, *see* Pet. App. 20a-24a, 46a-47a, respondents actively inserted themselves into the dispute by promising to pay MCI for the unauthorized telephone calls if MCI took no legal action against the UAE military trainees in question and provided respondents with documentation reflecting the unauthorized calls. This promise contained no proviso reserving to respondents the right to insist upon ever-higher standards of documentation, or to deny the facts even after exhaustively presented by MCI's records, or to deny MCI *all* reimbursement based upon a claim that *ten percent* of the persons listed on the MCI records were not UAE trainees (*see* Br. in Opp. 8). None of these actions had anything to do with the "skillful or successful settlement of differences between peoples," Br. in Opp. 9 n.5 (quoting dictionary definition of "diplomacy"). To the contrary, these actions were nothing more than transparent pretexts for respondents' repudiation of their commitment to pay MCI.

Respondents attempt to minimize the community of interest between them and the UAE citizen-trainees, *see* Br. in Opp. 13-16 nn.7-8, but never explain why, even if the citizen-trainees are regarded as "third parties," respondents' solemn promise to pay their debts does not qualify as "commercial activity" under the governing

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[3] This Court has made clear that formal categories do not substitute for a careful analysis of whether the "particular actions," *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992), in question are of a type "peculiar to sovereigns." *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993). Stripped of the conclusory labels, respondents' conduct amounts to nothing more than the "making and breaching of a contract with MCI." Pet. App. 14a (Garza, J., dissenting).

"private person" standard. *See* Pet. 14-16. Respondents' conclusory statement that respondents were "totally disinterested from a private or commercial standpoint" in MCI's dispute with the UAE military trainees (Br. in Opp. 13) is another example of their improper reliance on disputed factual contentions. It is also plainly wrong: the UAE citizen-trainees responsible for the illegal calls were employees of respondent UAE Ministry of Defense, and the ambassador was the official representative of these employee-citizens. Respondents were far from "neutral" for the additional reason that Note 5 of the Military Training Agreement made the UAE responsible for trainees' unpaid living expenses (*see* Pet. 3). Whether or not that agreement was ultimately determined to be enforceable in court by a private party (*see* Pet. App. 8a), the UAE's clear legal responsibility under Note 5 to pay for any calls attributable to its trainees further demonstrates the absurdity of any claim that the UAE ambassador came to this matter as a "totally disinterested" neutral.

If the parties had agreed or understood that the UAE ambassador's role would be that of a neutral arbitrator *between* MCI and the UAE trainees, rather than as partisan negotiator, this would of course be a very different case under the FSIA (indeed, MCI might not have a valid claim on the merits). But that hypothetical, which is the basis for respondents' entire Brief in Opposition, is simply irrelevant because it is not what MCI alleged or what the courts below based their rulings upon. MCI did not claim that respondents undertook to intercede with the trainees to try to persuade *the trainees* to pay MCI. What MCI alleged, and the predicate for both the district court's and the court of appeals' rulings, is that the UAE officials themselves made and then broke a promise to pay MCI. Respondents' repeated suggestions that these officials were

in effect acting in an adjudicatory capacity, *e.g.*, Br. in Opp. 19, are far off the mark.[4]

Respondents' flight from the operative factual allegations also colors their treatment of the conflicting decisions of other courts. For example, after correctly noting the D.C. Circuit's reliance on an Embassy's "active role" in business dealings as grounds for *denying* immunity in *Transamerican Steamship Corp. v. Somali Democratic Republic*, 767 F.2d 574 (7th Cir. 1989), respondents attempt to distinguish *Transamerican* on the ground that here the UAE embassy "adopted a strict position of passive neutrality regarding the MCI-UAE Student Battalion members' dispute." Br. in Opp. 9-10. But that is a preposterous misstatement of the governing factual allegations. Rather than adopting a passive and neutral approach with respect to the "dispute," the UAE ambassador affirmatively promised to pay for the unauthorized calls and demanded in return that MCI refrain from pursuing its legal remedies against the UAE citizen-trainees. By inducing MCI to defer action on the unauthorized calls, the UAE not only protected its employees and citizens, but also avoided a potential lawsuit against itself from MCI (or action by the United States Department of Defense) under Note 5 of the Military Training Agreement. MCI and the UAE ambassador confronted each other not as "petitioner" and tribunal, but as negotiators with openly adverse interests. Respondents' role in making and break-

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[4] In addition to being *irrelevant* to the jurisdictional issue given the procedural posture of this litigation, respondents' newly minted version of the facts is wholly implausible. If all MCI was to get from its dealings with UAE officials was a right to have those officials, in their absolute and unreviewable discretion, "adjudicate" MCI's complaints against UAE nationals, MCI would surely not have acted as it did. After all, MCI had a right to pursue remedies against the illegal telephone callers in United States courts. MCI gave up that right not because the UAE embassy would provide MCI with an adjudicative forum preferable to a United States civil court, but because *UAE officials expressly promised to pay MCI's damages* if MCI agreed to forgo legal action.

ing their promise to MCI was plainly *more* "active" than that of the Somali embassy in *Transamerican.*[5]

Even the Court of Appeals majority did not attempt to shoe-horn the facts as alleged by MCI into the form of an essentially governmental "mediation" or adjudication of a "petition for redress." As demonstrated in MCI's petition, the panel majority instead rested its decision upon a set of novel and highly restrictive *legal* prerequisites for "commercial activity." *See* Pet. 8-9. It is telling that respondents do not defend those novel legal rulings, which clearly call for review by this Court.[6]

Respondents conspicuously do not cite any authority to support the panel majority's holding that, in addition to showing that the UAE officials had made a legally binding promise, MCI had to show a "nexus" between itself and the UAE officials to bring the case within the commercial activities exception. *See* Pet. App. 8a. Respondents speculate (Br. in Opp. 15) that the court meant to refer to "the fact that neither the UAE ambassador, the

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[5] Respondents contend that the panel majority's unqualified declaration that "promises made through diplomatic channels do not constitute diplomatic activity," Pet. App. 7a, was tacitly limited to the special case of a "petition for redress." *See* Br. in Opp. 11. But the court's broad pronouncement cannot be so easily constrained. As already explained, *supra* pp. 2-3, the court of appeals plainly did *not* (and given the posture of the case, *could* not) rely on the "petition for redress" theory.

[6] Respondents now suggest for the first time that an agreement under which MCI would not press for prosecution of the delinquent UAE citizen-trainees would have been void under Texas law (Br. in Opp. 5 n.3). The cases respondents cite (*e.g., Merrell v. Timmons*, 158 S.W.2d 278 (Tex. 1942)), however, are wildly inapposite. Among other things, it is clear that law enforcement authorities here were already well aware of the illegal telephone calls, and it was *they* who asked MCI to come to a decision concerning restitution and whether to go forward with criminal prosecution. *See* Pet. App. 23a. In any event, respondents forfeited any "illegal contract" defense by defaulting, and the fact that they may seek to assert it on remand in no way militates against granting review on the jurisdictional question presented by the decision below.

UAE Embassy, nor the UAE itself was at any time personally or directly interested in the subject matter of MCI's petition for redress." But even if respondents' hypothesized explanation of the panel majority's "nexus" requirement were accurate, which it plainly is not, *see supra* pp. 2-3, that requirement was an unwarranted departure from this Court's instructions. The governing test is whether the government has exercised "powers that can also be exercised by private citizens." *Nelson*, 507 U.S. at 360. An otherwise enforceable promise to pay another person's debt is binding regardless of whether the promisor has a "direct" or "personal" relationship to the debtor or a prior relationship to the creditor. *See, e.g.*, 3 Richard A. Lord, *Williston on Contracts* § 7.19 at 370-71 (4th ed. 1992) (discussing, *inter alia*, promises by guarantors and promises made "in exchange for a forbearance to exercise some right against a third person"). The panel majority's unprecedented "nexus" requirement is inconsistent with the standards this Court has set down for judging "commercial activity." *E.g.*, *Weltover*, 504 U.S. at 614.

Respondents' current efforts to change the subject notwithstanding, the court of appeals clearly misconstrued the commercial activity exception in a number of important respects that call for review by this Court.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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